88-1191

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

ROBERTO VERGARA-VELEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

1. Whether the Court of Appeals decision is correct on the issue of whether the government agents executed the Search Warrant in violation of Title 18 U.S.C. 3109 thus depriving petitioner due process and a fair trial?

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Roberto Vergara-Velez respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit on or about October 28, 1988.

OPINION BELOW

The opinion of the Court of Appeals is reprinted herein as Appendix A.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on October 28, 1988 and this petition was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

After a trial by jury before Honorable John R. Bartels in the United States District Court for the Eastern District of New York, petitioner was found guilty of the crimes of conspiracy to distribute and possess with intent to distribute cocaine, and of possession of cocaine with intent to distribute it, pursuant to 18 U.S.C. Sec. 2 and 21 U.S.C. Sections 841(a)(1), 841(b)(1)(ii)(II), and 846.

On May 13, 1988 petitioner was sentenced to a term of imprisonment for a period of eight (8) years. He is presently serving his sentence.

Immediately preceeding the swearing of the jury, a hearing was held by the Court on a motion by defendant (reprinted herein as Appendix B) to suppress evidence seized during a search of defendant's home.

Upon the conclusion of testimony on the hearing which sought to suppress the contraband seized from petitioner's apartment, the motion was denied in its entirety.

At the defendant's pre-trial suppression hearing in the District Court, defendant elicited testimony from the government witness to the effect that a search warrant authorizing a search of defendant's home was obtained prior to the entry into defendant's home, that upon arriving at the door of defendant's home the agents knocked for some two or three minutes, at which time the officers saw someone at an upstairs bedroom window. That upon seeing the person look out the bedroom window, the agents immediately battered down the door and gained entry.

Defendant's defense has consistently been that the intruding agents violated 18 U.S.C. 3109 in failing to announce their purpose and authority in obtaining forcible entry to defendant's home.

Defendant's Notice of Motion, annexed hereto as Appendix B sets forth that the agents at no time adhered to the notice requirement mandated in 18 U.S.C. 3109.

Defendant's Notice of Motion further states in the affirmation annexed thereto that "*** because of the failure by the government agents to announce their purpose and authority at the time of the execution of the search warrant, the breaking of the door was unlawful and their very presence in the apartment unlawful."

REASONS FOR GRANTING THE WRIT

The issue presented for review in the Court of Appeals was whether the intruding government agents executed the search warrant in compliance with 18 U.S.C. 3109.

It is respectfully submitted that the Court answered that question in the negative, stating that *** there is nothing in the record that indicates that the officers announced their purpose ***."

The Court, citing *United States v. Braunig,* 553 F.2d 777 (2nd Cir.) stated that defendant waived his right to raise this argument in that he failed to raise the argument at the suppression hearing.

It is submitted that the holding in *United States v. Braunig, supra,* is predicated on the waiver provisions as set forth in Rule 12(f) of the Rules of Criminal Procedure which has as its goal pre-trial raising and disposing of all motions, defenses and objections capable of determination without a trial of the general issues.

In the case at bar defendant's objections to the validity of the execution of the Search Warrant were timely made and disposed of in the District Court.

Defendant's notice of motion and affirmation in support of the motion to suppress predicated on a violation of 18 U.S.C. 3109 clearly raised the issue as to whether or not the officers announced their authority and purpose prior to their forcible entry into defendant's home.

The issue before the Court of Appeals was: "Did the government agents act in compliance with 18 U.S.C. 3109?

In affirming defendant's conviction, the Court of Appeals stated that "*** the entry was proper because the officers had been constructively refused entry by the time they broke in."

On this issue the facts are not in dispute. The agent testifying at the suppression hearing stated that they knocked on the door of defendant's home for about two or three minutes, at which time they saw someone come to the upstairs window. This was the bedroom window and the time was approximately 11:30 p.m.

That upon seeing the person at the bedroom window, the agents battered down the door immediately, entered the home and ran up to the master bedroom where defendant was with his wife and child.

Clearly the action by the officers in failing to give the occupants an opportunity to voluntarily open the door was a violation of the provisions of 18 U.S.C. 3109 which provides:

> *"Breaking doors or windows for entry or exit.*
> The officer may break open any outer or inner door or window of a house or any part of a house, or anything therein, to execute a search warrant, if, after notice of his *authority* and *purpose*, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." (Emphasis added)

> "The purpose of the statute, among other things, is to allow the occupant to open the door to admit officers who are legally authorized to enter so that they may execute their duties with 'the least' possible inconvenience to the occupants. *Masiello v. United States*, 317 F2d 121 (D.C. Cir. 1963)

Investigator Gonzalez testified that as soon as the face appeared in the window, *** We figured we better break the door down right away and find out who's in there."

It is submitted that this does not constitute a constructive refusal to allow entry on the part of the occupants of the house.

The occupants at 11:30 p.m. in their bedroom on the second floor, were awakened by noise at the downstairs front door.

One of the occupants goes to the bedroom window and the entrance door is immediately broken down and the agents enter.

It is submitted that on these facts alone, which are undisputed, the entry by the officers was in violation of 18 U.S.C. 3109.

Property seized in violation of the statute may be suppressed. *United States v. Spinelli,* 848 F.2d 26, 28 (2d Cir. 1988).

Defendant contends that it is clear that the officers did not wait a reasonable period of time after seeing the face in the upstairs window before breaking down the door, thus precluding any opportunity to allow for the voluntary admittance of the officers. Where there is no opportunity to admit, it may not be said that admittance was refused. *United States v. Barrow,* 212 F. 2d 837 (1962); *United States v. Case,* 435 F. 2d 766 (1970); *Munoz v. United States,* 325 F. 2d 23 (1963).

Accordingly, as here, upon a proper and timely application, supported by the evidence, the denial by the District Court for an order suppressing property seized in violation of 18 U.S.C. 3109 denies the accused due process of law and a fair trial.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

JOSEPH F. VOTTO
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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28 day of October, one thousand nine hundred and eighty-eight.

PRESENT:
Hon. James L. Oakes,
Hon. Roger J. Miner,
Hon. Frank X. Altimari,
Circuit Judges.

United States of America,

Appellee,

v.

Roberto Vergara-Velez,

Appellant.

88-1196

ISSUED AS MANDATE: Nov. 23, 1988

ORDER

Roberto Vergara-Velez was convicted of conspiracy to distribute and possess with intent to distribute cocaine, and of possession of cocaine with intent to distribute it, pursuant to 18 U.S.C. §2 and 21 U.S.C. §§841(a)(1), 841(b)(1)(B)(ii)(II), and 846, in the United States District

Court for the Eastern District of New York, John R. Bartels, Judge. On appeal, Vergara-Veleson for delay of an appeal of this decision, and a final judgment is directed to be entered as to Fustok pursuant to Fed.R.Civ.P The search was conducted pursuant to a warrant. Appellant argues that the officers failed to comply with the knock-and-announce statute, 18 U.S.C. §3109, before breaking into his home. We affirm the conviction.

Appellant argues first that the officers violated section 3109 by failing to announce their purpose in seeking entry. The statute permits an officer to break into a home to execute a search warrant "if, after notice of his authority and purpose, he is refused admittance." 18 U.S.C. §3109. Property seized in violation of the statute may be suppressed. *United States v. Spinelli,* 848 F.2d 26, 28 (2d Cir. 1988). Although there is nothing in the record that indicates that the officers announced their purpose, Vergara-Velez did not raise this objection to the search at the suppression hearing. Therefore, he has waived the right to raise this argument. *See United States v. Braunig,* 553 F.2d 777, 780 (2d Cir.) ("[W]here a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal.") (citations omitted), *cert. denied,* 431 U.S. 955 (1977).

Appellant also argues that the officers should have allowed additional time for someone to answer the door. After two or three minutes of knocking, the officers saw someone at an upstairs window and entered almost immediately. We find that entry was proper because the officers had been constructively refused entry by the time they broke in. *See, e.g., Masiello v. United States,* 317 F.2d 121, 122 (D.C. Cir. 1963) ("[I]t would be an unusual

case . . . where an occupant affirmatively 'refused admittance' or otherwise made his refusal known verbally.").

Finding that the admission of the evidence resulting from the search was proper, we affirm the conviction.

s/ James L. Oakes
James L. Oakes

s/ Roger J. Miner
Roger J. Miner

s/ Frank X. Altimari
Frank X. Altimari,
Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B—NOTICE OF MOTION IN THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERTO VERGARA-VELEZ,

Defendant.

Indictment No. CR 87 0634
NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE, that upon the affirmation of Joseph F. Votto, Esq., dated the 27th day of October, 1987, the indictment herein and all the other papers and proceedings heretofore had herein the defendant, Roberto Vergara-Velez will move this Honorable Court for an order pursuant to rule 12, Federal Rules of Criminal Procedure, suppressing the contraband seized from the premises known as the apartment located at 225-05 Horace Harding Expressway, Queens, New York, and precluding its use by the government as evidence at the trial of this action, together with such other and further relief as to this Court may seem just and proper.

Yours, etc.

Joseph F. Votto
Attorney for defendant
94-01 37 Avenue
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(718) 478-2434

To:
Honorable Mark A. Constantino
Judge-District Court
Eastern District-New York

Andrew J. Maloney
U.S. Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERTO VERGARA-VELEZ,

Defendant.

State of New York)
County of Queens) ss:

AFFIDAVIT

Joseph F. Votto, being duly sworn, deposes and says:

That I am an attorney duly admitted to practice in the United States District Court for the Eastern District of New York.

That I have been retained by the above-named defendant, and submit this affidavit in support of an application pursuant to Rule 12, Rules of Federal Criminal Procedure.

That the defendant is charged in the instant indictment with a violation of Title 21, U.S.C., Section 841(a)(1), 841(b)(1)(B)(ii)(II) and 846; Title 18 USC 2. That on September 3, 1987, at approximately 11:30 P.M., while the defendant, his wife and child were in their apartment located at 225-05 Horace Harding Expressway, County of Queens, agents of the Drug Enforcement Administration executed a search warrant at said premises.

That as a result of the execution of said search warrant, two packages of white powder were found. It is alleg-

ed that each package contained approximately one (1) Kilogram of Cocaine.

Defendant, by this application, seeks this Court to preclude the government from offering the items found at the trial of this action, on the ground that a search warrant was executed in violation of 18 U.S.C. 3109.

It is claimed that at approximately 11:30 P.M. on September 3, 1987, agents of the Drug Enforcement Administration entered defendant's home by violently breaking down the door. That at no time did they adhere to the notice requirement as mandated in 18 U.S.C. 3109.

It is alleged that loud noise was heard by the three occupants of the apartment and immediately government agents rushed into the apartment, arrested defendant and his wife and searched the entire apartment.

It is respectfully submitted that because of the failure by the government agents to announce their authority and purpose at the time of the execution of the search warrant, the breaking of the door was unlawful and their very presence in the apartment was unlawful. It then follows that the search was unlawful and the evidence procured should be suppressed.

WHEREFORE, your deponent respectfully requests this Honorable Court grant defendant's motion in its entirety, together with such other and further relief as to this Court may seem just and proper.

s/ Joseph F. Votto

Sworn to before me
this 27th day of October, 1987